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Appellee's Brief 1975-SC-1152

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KYSC1975-SC-1152-02

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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY
File No. 75-1152

JAMES R. YOCOM, COMMISSIONER,
KENTUCKY DEPARTMENT OF LABOR
and CUSTODIAN OF SPECIAL FUND APPELLANT

v.

REGINOLD BILL VANOVER,
RITA COAL COMPANY and
WORKMEN'S COMPENSATION BOARD APPELLEES

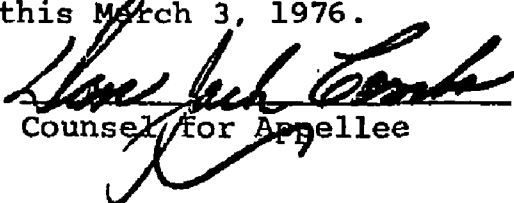
Appeal from Pike Circuit Court
Honorable Reed D. Anderson, Judge

FILED BRIEF FOR APPELLEE

MAR 18 1976
MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

Dan Jack Combs
207 Caroline Avenue
Pikeville, Kentucky 41501
Counsel for Appellee

I hereby certify, pursuant to RCA 1.250,
a copy of the within Brief for Appellee has
been mailed to Hon. Reed D. Anderson, at
Pikeville, Ky.; Hon. Cyril E. Shadowen, at
Louisville, Ky.; Hon. William J. Baird, III,
Pikeville, Ky.; Hon. W.L. Huffman, Director,
Frankfort, Ky., this March 3, 1976.


Counsel for Appellee

4373

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QUESTIONS PRESENTED

- I. DID THE BOARD ABUSE ITS DISCRETION IN FAILING TO GRANT APPELLEE A FIVE-DAY EXTENSION TO TAKE REBUTTAL EVIDENCE AND DID THE BOARD ERR IN NOT PERMITTING THE DEPOSITION FILED?

Appellee contends the answer to both these questions is "Yes".

- II. DID THE BOARD ERR IN DISMISSING THIS APPELLEE'S CLAIM?

Appellee contends the answer to this question is "Yes".

SUPREME COURT OF KENTUCKY

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JAMES R. YOCOM, COMMISSIONER,
KENTUCKY DEPARTMENT OF LABOR
and CUSTODIAN OF SPECIAL FUND

APPELLANT

v.

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RITA COAL COMPANY and
WORKMEN'S COMPENSATION BOARD

APPELLEES

BRIEF FOR APPELLEE,
REGINOLD BILL VANOVER

MAY IT PLEASE THE COURT:

COUNTER STATEMENT

Appellee, Reginold Bill Vanover, is now 57 years of age, and is a functional illiterate. Mr. Vanover has spent approximately thirty years as an underground coal miner. At the time he became disabled he was earning in excess of \$40.00 a day.

His family physician was Dr. Sutherland, who advised him to leave the mines because of his deteriorated pulmonary condition.

This appellee took and filed the deposition of Dr. Paul L. Odom on July 10, 1974, and the deposition of his treating physician, Dr. Sutherland, on August 23, 1974.

Appellant had this appellee examined by Dr. W. H. Anderson of Louisville, and Dr. Ballard D. Wright of Prestonsburg.

Appellee, Rita Coal Company, had this appellee examined by Dr. O. W. Thompson, whose deposition was never taken; and by Dr. G. N. Combs, a radiologist, who testified in opposition to appellee's claim.

The appellant took the deposition of

Dr. Anderson but did not take the deposition of Dr. Wright. It did, however, take the deposition of Dr. O'Neill, who ostensibly testified from Dr. Wright's x-rays. Appellant obtained from the Board two thirty days extensions in which to complete its evidence. Under the rules of the Board appellee had five days thereafter in which to take rebuttal evidence.

Dr. Wright's deposition was scheduled to be taken at 2:45 p.m. at Paintsville on December 2nd. On that morning appellee's counsel received a telephone call from Dr. Wright's office advising that Dr. Wright was unable to give the deposition on that date because of inclement weather. At that time the deposition was rescheduled for 3:00 p.m. Thursday, December 5th. A motion

for a five days extension was promptly prepared and mailed to the Board on December 2nd, the cancellation date. Appellant's counsel and this appellee's counsel appeared at the deposition. Thereafter the Board overruled appellee's motion for the five days extension of time and later overruled his motion to file Dr. Wright's deposition.

Without entering an order submitting the claim, and without Dr. Wright's deposition, the Board entered an Order dismissing this appellee's claim.

A petition for reconsideration was filed, but summarily overruled. An appeal was promptly prosecuted to the Pike Circuit Court and an Order was entered reversing the Board and ordering the case remanded to the Board with directions that the Board

permit the filing of Dr. Wright's deposition and consideration of the case on the entire record.

ARGUMENT

I. THE BOARD ABUSED ITS DISCRETION
IN NOT EXTENDING REBUTTAL TIME
AND IN NOT PERMITTING DR. WRIGHT'S
DEPOSITION TO BE FILED

This writer has practiced compensation law for almost a quarter of a century. Practically all of that time he has been on the plaintiff's side of the table.

From reading the history of the Act and the many decisions of this Court construing the Act, I was of the opinion that the Act was designed to help the working man and that the Board was created for that purpose. Only recently have I changed my opinion. It now seems that the sole purpose of the Board is to accomodate

the Special Fund and defendant-employers. This writer has been involved in two cases before the Board, one being case number 949432 where defendant and Special Fund were granted 210 days in which to complete their evidence; and another case number 1013639, still pending before this Board, where defendant and Special Fund were granted 180 additional days to take their evidence. Never have I heard of the Board overruling a defendant's request for time in which to complete evidence. Here we asked for five days in which to take rebuttal. Why were we denied? Only the Supreme Being would know why we were denied. Learned counsel for Special Fund makes much of the fact that our motion for an extension was not received by the Board

until December 4th. We couldn't help that. We didn't know until 9:30 a.m. on December 2nd that the deposition would not be taken that afternoon. How could we have gotten our motion for an extension into Frankfort before we had notice that the request for an extension would be necessary? The answer is absurd. On page 5 of its brief, Appellant says that an order was entered on December 2nd submitting the case for opinion and judgment and permitting briefing time. I don't think this happened. Certainly this writer nor counsel for Rita Coal Company ever received such an order of the Board.

Why is the Special Fund so upset about the taking of Dr. Wright's deposition? The answer should be obvious.

They employed him to do the examination. He found the disease and so reported that fact to the Special Fund. Where was the Special Fund prejudiced? Their counsel was present at the deposition and examined Dr. Wright rather extensively. If the truth constitutes prejudice then I must admit that the Fund may have been prejudiced by the report and the testimony of its witness. I'm shocked that the Fund would bother this court with this appeal. Why they would not permit the remand under the directions of the Circuit Court and let the Board consider the case on the basis of all the evidence is a mystery to me. All we want is our day before the Board, with all of the evidence, the good and the bad. We could

not help the blizzard of December 2, 1974. We submit that the Trial Court was correct when it held that the Board abused its discretion in not permitting the deposition of Dr. Wright to be filed and considered on the merits of this case.

II. THE BOARD ERRED IN DISMISSING THIS APPELLEE'S CLAIM

As noted earlier, Dr. Sutherland, appellee's treating physician, testified appellee had the disease and was disabled therefrom. So did Dr. Paul L. Odom. Both doctors have had many years experience in treating coal miners. In opposition to this testimony, Rita Coal Company took the deposition of Dr. G. N. Combs, who reported:

"The heart and great vessels appear within normal limits.

The lung fields are clear. Bony thorax and diaphragm shadows appear within normal limits. Impression: Negative chest. There is no evidence of pneumoconiosis." (Combs Dep. pp. 6-7).

When asked on cross examination about shotlike densities, he answered, "I don't see anything in this chest film other than...if you see shotlike densities, I don't see them. I see very few which are not anything beyond the normal and must be attributed to cross blood vessels." Then he goes on and says "...there's some little calcifications in the right base but again nothing that's out of the ordinary for a normal citizen of this area." He went on to say, "This person undoubtedly had healed histoplasmosis or healed primary childhood complex. There's calcification

of the hilar lymph nodes on both sides and one fairly large calcified mediastinum node on the right side which we do attribute to either healed primary childhood tuberculosis or histoplasmosis." (Combs Dep. p. 9, q. 4-8).

Does this sound like a normal chest as he originally reported on direct examination? We submit that it is not.

Dr. Combs when asked if he saw any radiopaque material resulting from myelogram, answered, "there is no residual of opaque media in the subarachnoid space in any of these films; therefore, no evidence of a myelogram procedure and neither do I notice any evidence of operative procedure on the back of this individual."

We submit that these abnormalities are, as found by Drs. Odom, Sutherland and Wright, the result of appellee's prolonged exposure to harmful dust as an underground coal miner.

In dismissing the claim the Board found that neither Dr. O'Neill nor Dr. Anderson found any evidence of pneumoconiosis. Dr. O'Neill never examined the appellee. He simply interpreted the chest x-ray taken by Dr. Wright. His x-ray was never in evidence. The learned Dr. O'Neill after giving about thirteen pages of testimony as to his qualifications and to the types of examination performed on his patients, admitted that he had never examined appellee, had never x-rayed him, but was testifying from x-rays taken on April 15, 1974 by Dr. Ballard Wright.

He interpreted these x-rays as:

"The bony thorax shows evidence of mild degenerative changes of the dorsal spine. The outline of the heart and great vessels is within normal limits. There appears to be evidence of dye in the spinal column probably secondary to a previous myelogram. The lung fields are essentially free of infiltrative lesions. The patient is wearing an abdominal or spinal support belt.

Impression: Essentially normal chest other than for dye in the spinal column secondary to previous myelogram."

Now I don't know who x-rays the learned Dr. O'Neill was reading. Certainly not those of Mr. Vanover. Mr. Vanover has never had a myelogram. Dr. Wright did not report any evidence of a dye when he interpreted his x-rays. Dr. Combs didn't see any on his x-rays; nor did Dr. Anderson. In fact, all negated the statement of Dr. O'Neill. We

must conclude therefore that Dr. O'Neill was not interpreting the x-rays of Mr. Vanover. If he was, his vision failed on the day in question.

Dr. Anderson did not find evidence of pneumoconiosis or silicosis. He did interpret appellee's x-rays as revealing "calcified lesion at the right base, this having the appearance of a previously healed infectious process." (Anderson Dep. p. 6). He saw no evidence of dye in the spinal canal. (Anderson Dep. p. 8, q. 20). When asked if the calcified lesion constituted a normal lung, he answered "Not a calcified lesion at the right base is not part of a normal chest x-ray." Yet Drs. Combs and O'Neill testified that the lungs were normal and clear.

Drs. Combs and O'Neill testified that the lungs were free of an infiltrated lesion.

Dr. Anderson says they were not free.

(Anderson Dep. p. 8, q. 22). When Dr. Anderson was asked if he thought appellee could return to coal mining, he answered:

"No" and that he felt that his condition was permanent.

Dr. Wright's deposition was taken on December 5th. After taking a history, performing physical, taking chest x-rays, pulmonary function studies, Dr. Wright concluded:

"He has x-ray findings consistent with coal workers pneumoconiosis. He has ischemic heart disease, and there are also changes on x-ray which are consistent with old granulomatous disease."
(Wright Dep. p. 3, q. 9-11).

Dr. Wright also felt that appellee, by

reason of his pulmonary problem could not return to coal mining. (Wright Dep. p. 3, q. 13).

Six doctors examined plaintiff and six have testified, but not the same six. Dr. O. W. Thompson examined appellee for Rita Coal Company. He didn't testify. Dr. O'Neill never examined appellee, but he testified, and said everything was clear except the residuals of a previous myelogram.

Drs. Sutherland and Odom examined and testified for appellee. Dr. Wright examined for Special Fund and testified for this appellee. Dr. Combs testified for Rita Coal Company that the lungs were clear. On cross examination he admitted they were not and his testimony was con-

tradicted by that of Dr. Anderson. We submit that the only believable competent evidence in opposition to this claim is that of Dr. Anderson. He contradicted both Combs and O'Neill, and supported the findings of Wright, Sutherland and Odom as to pulmonary abnormalities evidenced by x-rays. He differs with these three doctors only as to the etiology of the x-ray changes. We submit that the Board not having the benefit of Dr. Wright's testimony erred in dismissing the claim and erred in placing any credence or weight whatsoever in the obvious impossible testimony of Dr. O'Neill.

CONCLUSION

In view of the foregoing, appellee respectfully submits that the Trial Court

was correct in reversing the Board and remanding the claim for consideration of all the testimony, including the deposition of Dr. Wright, on the question of whether appellee suffers from the disease and is totally disabled therefrom.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Dan Jack Combs", written in a cursive style.

Dan Jack Combs
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Attorney for Appellee,
Reginold Bill Vanover